84-683

No.

In The

Supreme Court of the United States

October Term, 1984

PETER J. SERUBO and JOHN SERUBO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Under the Extortionate Credit Transactions statute, 18 U.S.C. §891, *et seq.*, may a wholly fictitious debt constitute an "extension of credit" under 18 U.S.C. §891(1) and, relatedly, may an agreement to defer repayment or satisfaction of debt be implied from a wholly fictitious debt?
investigation by circularizing customers.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Peter J. Serubo and John Serubo, jointly pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed their respective judgments of conviction entered upon jury verdicts of guilty.

STATEMENT OF RELATED CASES

Pursuant to Supreme Court Rule 21.1(b), petitioners state that the appellants below were Anthony DiPasquale, James DiPasquale, August Redding, Vincent Szwanki and petitioners, under United States Court of Appeals for the Third Circuit, Nos. 83-1364/69 and 83-1449.

A petition for a writ of certiorari has heretofore been filed by appellant August Redding, which is now pending before this Court.

Pursuant to Supreme Court Rule 19.4, petitioners adopt and join in the petition for a writ of certiorari filed on behalf of August Redding, and any other such petition filed on behalf of any of the referenced co-appellants.

Petitioners note that the trial court opinion in this case is reported as *United States v. DiPasquale,* 561 F. Supp. 1338 (E.D. Pa. 1982). The Court of Appeals opinion is not yet reported but is reproduced in full at Appendix A.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

Petitioners, Peter J. Serubo and John Serubo, jointly seek a writ of certiorari to review the judgment rendered in accordance with the opinion (Appendix A, 1a) of the United States Court of Appeals for the Third Circuit on July 31, 1984. The judgment of the Court of Appeals (Appendix B, 31a) affirmed petitioners' jury convictions of conspiracy and use of extortionate means to collect extensions of credit [18 U.S.C. §894(a)], entered in the United States District Court for the Eastern District of Pennsylvania.

A petition for rehearing *en banc* was denied by the United States Court of Appeals for the Third Circuit on the 28th day of August 1984 (Appendix C, 33a).

The United States Supreme Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. §1254(1). This petition is timely filed pursuant to Supreme Court Rules 20.1 and 28.2.

PERTINENT STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Title 18, United States Code, Section 891(1):

> To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising may or will be deferred.

Title 18, United States Code, Section 891(4):

> The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claims, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

Title 18, United States Code, Section 894(a):

> Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonpayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

STATEMENT OF THE CASE

A. Procedural History

Petitioners, Peter J. Serubo and John Serubo, were indicted by a grand jury sitting in the United States District Court for the Eastern District of Pennsylvania and charged with collection of a "claimed debt" by extortionate means and conspiracy to collect "claimed debts" by extortionate means, 18 U.S.C. §894(a).

Petitioners, and their co-defendants, stood trial before a jury and were convicted of both charges. Sentences of imprisonment were imposed and an appeal was taken to the United States Court of Appeals for the Third Circuit.

On July 31, 1984, the United States Court of Appeals for the Third Circuit affirmed petitioners' conviction (Appendix A, 30a). A petition for rehearing *en banc* filed on behalf of petitioners was denied on August 28, 1984 (Appendix C, 34a). This petition seeks review by the United States Supreme Court of the decision of the United States Court of Appeals for the Third Circuit affirming petitioners' convictions.

B. Factual History

The indictment alleged that a group of persons, with Anthony DiPasquale as the leader, engaged in a conspiracy from September 1979 up to the date of indictment to collect claimed debts from certain persons by extortionate means. Petitioners were alleged to have been involved in this activity, both substantively and conspiratorially, by virtue of what became known as the "Crawford Incident".

Petitioners were associated with a car dealership known as John's Chevrolet; Swain Crawford was a used car salesman employed there. According to the evidence, in May 1981 Crawford was falsely accused by petitioners and others of having stolen money from petitioner Peter Serubo. The Government's evidence tended to show that various threats were made to Crawford to induce him to pay the money that he had allegedly stolen. Crawford later delivered a ring to DiPasquale as security and eventually paid over the money which petitioners falsely claimed he had stolen and which he denied having stolen. The ring was returned to Crawford upon payment of the money. Crawford was compelled to pay an additional small sum for the benefit of DiPasquale, allegedly as payment for DiPasquale's collection services.

Although several additional incidents of similar character were proved by the Government at trial, petitioners' culpable involvement in the alleged scheme was confined to the "Crawford Incident". In its opinion (Appendix A, 15a), the Court of Appeals acknowledges that DiPasquale's activity on behalf of petitioners in the "Crawford Incident" presents a "closer question" than the remaining incidents in the case with respect to whether petitioners were members of the overall conspiracy, but the court

held that petitioners had sufficient awareness of DiPasquale's collection methods to implicate them in the broader conspiracy.

In sum, petitioners were convicted on the theory that they had participated in a scheme to extort money for Crawford by falsely claiming that he had stolen money from them and then threatening him with bodily harm unless he paid over money to them.

Petitioners contend that while this scenario may be classic Hobbs Act extortion, 18 U.S.C. §1951, it is not prosecutable under 18 U.S.C. §841, *et seq.*, Extortionate Credit Transactions, under which they were in fact prosecuted and convicted.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 17.1(a) states that one of the factors which the United States Supreme Court will consider, which while neither controlling nor fully measuring the Court's discretion, in granting a petition for a writ of certiorari is whether a federal court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter.

Petitioners call to this Court's attention that the decision of the Court of Appeals in the present case is contrary to the decision of the United States Court of Appeals for the Seventh Circuit in *United States v. Boulahanis,* 677 F. 2d 586 (7th Cir.), *cert. denied,* 103 S. Ct. 375 (1982), with respect to the question presented for review in this petition. In that case, the Seventh Circuit held that neither a debt nor circumstantial evidence of an agreement to defer repayment of a debt is alone sufficient to prove an extension of credit and in such circumstances the definition of

"extension of credit" under the statute should not include wholly fictitious claimed debts. In the present case, the Court of Appeals stated:

> We decline to follow *Boulahanis* because we believe that its construction is inconsistent with the language and purpose of [the Extortionate Credit Transactions statute]. [Appendix A, 10a, bracketed material added.]

Petitioners urge that with respect to this issue there exists the referenced split of the Circuits and sufficient decisional law has developed through consideration by the courts of appeals that the issue is appropriate and timely for review by the United States Supreme Court.

I.

Under the Extortionate Credit Transactions statute, 18 U.S.C. §891, *et seq.*, a wholly fictitious debt may not constitute an "extension of credit" under 18 U.S.C. §891(1) and, relatedly, an agreement to defer repayment or satisfaction of debt may not be implied from a wholly fictitious debt.

With respect to the "Crawford Incident", the indictment charged the collection by extortionate means of "claimed debts". The evidence showed extortion of money not owed by the alleged victim but which petitioners and others fictitiously claimed was owed. This same theory formed the basis for petitioners' conspiratorial liability on the conspiracy count.

The Court of Appeals held the reality of extension of credit immaterial under 18 U.S.C. §891(1) which defines the term "to extend credit" as follows:

> To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, where the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

The Court of Appeals effectively held that mere extortion, camouflaged by a fictitious claim of debt, is covered by the Extortionate Credit Transactions statute. The Court of Appeals held:

> We conclude that under §891(1), an agreement to defer the repayment of a debt may be implied from the debt, even if the debt is wholly fictitious. When a self-styled creditor appears before his "debtor" and demands satisfaction, the creditor posits both the debt and the prior deferral of its repayment. We believe that the definition of an extension of credit encompasses this type of transaction, which the indictment before us accurately describes as the collection of a claimed debt. (Appendix, 9a).

Petitioners argue that Congress' qualification of the words, debt and claim, cannot be read as including fictitious debts or claims which have been merely asserted as a cover-up or pretense for engaging in simple extortion. In petitioners' view, when Congress spoke of an agreement being "express or tacit", this necessarily means a real agreement based on stated intentions or circumstances. When Congress spoke of the claim being either admitted or disputed, it described a well-known legal phenomenon which excludes fictitious claims. The same is true with respect to the qualifying words, valid or invalid; all of these modifiers

exclude wholly imaginary, fictitious debts used as a means to commit simple extortion.

The decision of the Court of Appeals blurs the critical distinction between Hobbs Act extortion, 18 U.S.C. §1951 and extortionate collection of extensions of credit, the latter being the sole focus of the congressional language and intent in §§891-896 of Title 18, which constitutes Title II of the Consumer Credit Protection Act of 1968, Pub. L. No. 90-321, 82 Stat. 159 (Codified at U.S.C. §§891-896). The latter statute purports to deal solely with extortionate credit transactions; the Court of Appeals decision in the present case unjustifiably extends the scope of this statute. The holding of the Court of Appeals that an agreement to defer the repayment of a debt can be implied from a wholly fictitious debt changes the congressionally protected class from the users of consumer credit to the entire population despite ample evidence that this is not what Congress intended.

As noted, *supra,* the present decision has created a Circuit split by expressly rejecting the Seventh Circuit view that a false claim of debt is not an extension of credit under §891(1). *United States v. Boulahanis,* 677 F. 2d 586, 590 (7th Cir.), *cert. denied,* 103 S. Ct. 375 (1982).

Petitioners submit that the decision below conflicts with specific holdings of the United States Supreme Court on the meaning of "credit" in the statute as denoting "the right granted by a creditor to a debtor to defer payment of a debt or to incur debt and defer its payment", wherein the creditor assumes a "credit risk". The central concept of the "risk of finance" as the essential ingredient of "credit" was overlooked by the lower court. The lower court failed to consider this Court's adoption in *Ford Motor Credit Co. v. Cenance,* 452 U.S. 155 (1981) of

the "risk of finance" touchstone in defining the creditor/debtor relationship in Title I of the same act (truth-in-lending). *See also, Meyers v. Clearview Dodge Sales, Inc.*, 539 F. 2d 511 (5th Cir. 1976).

In the present case, the Court of Appeals has observed that Congress intended Chapter 42 of Title 18 to be wielded with "vigor and imagination" (Appendix, 9a). The conference report which is referred to by the panel actually says:

> The conferees wish to leave no doubt of the congressional intention that the bill is a weapon to be used with vigor and imagination against every activity of organized crime *that falls within its terms.* [Emphasis added.]

It is seriously doubtful that Congress intended so imaginative an application as would fall beyond the term, extension of credit, which it has carefully and consistently used in all nine titles of the Consumer Credit Protection Act. The term must be interpreted in harmony with the plain meaning of companion titles of the Act and decisional law thereunder. For example, in *Staub v. Harris,* 626 F. 2d 275 (3d Cir. 1980), it was accepted that the Act was restricted to real extensions of credit and tax collection practices were held not covered under Title VIII of the Act because no credit relationship was involved.

Moreover, the lower court infers an agreement to defer repayment of a debt from an extortionist's mere demand for money. Where the debt is not real, the self-styled creditor cannot be said to imply a demand for "repayment". The implied agreement rationale in these circumstances also omits the basic element of the "risk of finance" where defendant is a mere

extortionist, who has cloaked his demand with a false claim of past debt. This concept is central to the statutory scheme. *Ford Motor Credit Co. v. Cenance, supra.* The lower court in effect erected an agreement from the fictitious debtor's mere acknowledgment of the fact of non-payment but, as the Seventh Circuit accurately observed in *Boulahanis, supra,* this reasoning converts the fictitious debtor's mere failure to pay into the fictitious creditor's voluntary grant of the right to defer repayment of the debt. Whether the statutory "agreement to defer repayment or satisfaction of any debt or claim" is unilateral or bilateral is a moot question but it is clear that the act of a fictitious debtor in failing to pay a fictitious debt does not permit the inference of an extension of credit by an extortionist. The superficiality similarity to loan sharking demands of the type described in the lower court opinion ignores the reality of the extortion transaction, *i.e.,* that there is no extension of credit within the meaning of 18 U.S.C. §891(1).

As was noted in *Boulahanis:*

> . . . all [the evidence] shows is that [the victim] had (in the view of the appellants, which they coerced [the victim] to accept) defaulted on a payment due the appellants. The extension of credit is a deliberate act by a creditor. It does not occur merely because a customer defaults. §894 does not make it a crime to use extortion to collect debts, but only to exact repayment of credit previously extended. [677 F. 2d at 590].

Petitioners urge the Supreme Court to grant certiorari to review this important question of federal law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

JOHN ROGERS CARROLL
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Attorneys for Petitioners

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JULY 31, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-1364, 83-1365, 83-1367,
83-1368, 83-1369, & 83-1449

UNITED STATES OF AMERICA,
Appellee,

v.

ANTHONY DiPASQUALE,
Appellant in No. 83-1364,

JAMES DiPASQUALE,
Appellant in No. 83-1365,

AUGUST REDDING, aka "Porky",
Appellant in No. 83-1367,

JOHN SERUBO,
Appellant in No. 83-1368,

PETER SERUBO,
Appellant in No. 83-1369, and

VICTOR SZWANKI,
Appellant in No. 83-1449.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Appendix A

Argued March 1, 1984
Before: SEITZ, GARTH, *Circuit Judges*,
and PORTER, *District Judge*•

Opinion Filed July 31, 1984

OPINION OF THE COURT

SEITZ, *Circuit Judge*.

The six appellants were convicted and sentenced on one count of conspiracy to collect "claimed debts" by extortionate means in violation of 18 U.S.C. § 894(a). Five of the six were convicted and sentenced on various counts of the underlying substantive offense, also in violation of section 894(a). We have appellate jurisdiction under 28 U.S.C. § 1291.

I. FACTS

We adopt the district court's comprehensive and detailed narration of the facts, *see United States v. DiPasquale*, 561 F. Supp. 1338, 1341-46 (E.D. Pa. 1983). An abridgment of the district court's presentation follows.

A. *The Cosmo Incidents.*

1. *September and November 1979.* In 1978 and 1979, Anthony DiPasquale, his brother James, and

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• Honorable David S. Porter, United States District Judge for the Southern District of Ohio, sitting by designation.

Michael Cosmo were engaged in the sale of "speed", or methamphetamine. Twice during the autumn of 1979, Anthony, assisted on one occasion by August Redding, forced Cosmo to pay thousands of dollars that Anthony claimed Cosmo owed him. The opinion of the district court, 561 F. Supp. at 1341-42, reflects the details of these first two incidents.

2. *December 1979.* Cosmo worked for a man who installed carpet, and in December 1979, Anthony asked Cosmo and his employer to carpet his basement. Anthony, Redding, and others played cards while Cosmo and his employer worked in Anthony's basement. When Cosmo attempted to leave the house, Redding and Anthony attacked him with fists, feet, and a fireplace poker, until Cosmo lost consciousness. He awoke in the basement, handcuffed to a pinball machine, with Anthony shouting that Cosmo would die. Cosmo agreed to borrow money to pay what Anthony claimed he owed.[1] After Cosmo was taken upstairs, Victor Szwanki punched and tormented him. Cosmo was finally released, and he paid Anthony a few days later, after he obtained the money from his relatives.

Based on this incident, Anthony, Szwanki, and Redding were convicted of collecting a claimed debt by extortionate means.

3. *January 1980.* The following month, Szwanki, James DiPasquale, and two others visited Cosmo at his home. James demanded $25,000 that he claimed Cosmo owed Anthony. When Cosmo denied

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1. When Cosmo first related the December 1979 incident, he did not mention that Anthony claimed Cosmo owed him money. Later, however, Cosmo testified that Anthony said on all three occasions in 1979 that Cosmo must pay what he "owed" Anthony. In view of the guilty verdict we must take this later testimony as fact.

the debt. James and Szwanki beat and choked him. Although his attackers warned Cosmo not to contact the police, Cosmo reported the incident at his family's insistence. James called Cosmo and told him he would be killed, but for once Cosmo was fortunate.

B. *The Kolzer Incident.*

In December 1980, James Kolzer loaned Anthony $10,000 to finance Anthony's manufacture of speed. After they split the proceeds of a subsequent drug sale, Anthony claimed that Kolzer owed him $8,000. Kolzer denied the claim. In February 1981, Redding telephoned Kolzer, told him that he was calling at Anthony's behest, and requested $8,000 to get Anthony out of jail. Kolzer denied any indebtedness to Anthony and refused to pay.

Anthony and Kolzer subsequently discussed undertaking another drug deal, and Anthony arranged to meet Kolzer one night in March 1981. Anthony and Szwanki took Kolzer to Joseph West's auto body shop, where they drew their guns on him. Szwanki bound Kolzer, forced him to kneel, and put a bag over his head. Kolzer was beaten with what he believed to be a pipe. Anthony claimed Kolzer owed him $8,000, but demanded more in return for Kolzer's life. During the balance of the night, Kolzer was hung by a chain hoist, beaten repeatedly, and burned. He made telephone calls in an effort to raise money.

When the torture concluded, Anthony washed and bandaged his victim and had self-developing pictures taken of various combinations of Kolzer, Szwanki, and himself. Szwanki took Kolzer to a bar, where he made more telephone appeals for money. Later, Szwanki accompanied Kolzer to Western Union, where they picked up money that Kolzer had raised. Kolzer and Szwanki proceeded to another bar, where they met Anthony and Kolzer's cousin. The cousin provided

additional funds, which were given to Anthony. Kolzer was then allowed to depart.

Based on this incident, Anthony and Szwanki were convicted on a second count of collecting a claimed debt by extortionate means.

C. *The Crawford Incident.*

Swain Crawford was a used car salesman at John's Chevrolet, a car dealership owned by John Serubo and perhaps by his father Peter, who was at least associated with the business. On May 9, 1981, Anthony told Crawford to go to John Serubo's office. In the office were Anthony, both Serubos, and another man, described as "burly". Anthony punched Crawford and asked why he had taken money from Peter Serubo. Anthony struck Crawford repeatedly and smashed a bottle over his head. Peter told Crawford that he owed the Serubos $1,800, and when Crawford denied it, Anthony put a gun to Crawford's head. Crawford telephoned a friend, who said she would make arrangements to get the money.

At Anthony's direction, the burly man and defendant Nicholas Fidelibus took Crawford to West's auto body shop. The men described a beating that Anthony had conducted at the garage and said that the victim had been hung from the hoist. Crawford telephoned his friend again, and she offered a diamond ring. After telephoning John Serubo, Fidelibus and Crawford picked up the ring and returned to John's office.

There, Anthony examined the ring and said that if it was worth less than $12,000, it was not worth Crawford's life. Anthony gave the ring to Peter and told Crawford to pay the $1,800 two days later. On the appointed day, Crawford paid the money to the Peter, and John returned the diamond ring. Peter had a check for $200 drawn to Crawford in payment of sales

commissions then due. Crawford was required to endorse the check and to give it to John as payment to Anthony for his collection services.

Based on the Crawford incident, Anthony was convicted on a third count of collecting a claimed debt by extortionate means. John Serubo, Peter Serubo, and Nicholas Fidelibus were also convicted on this count. Fidelibus does not appeal.

D. *The Rosetti Incident and the Courtney Incident. The Conspiracy.*

The district court describes two further incidents, in which Anthony threatened Francis Rosetti and battered Mark Courtney until each agreed to pay money "owed" to the Serubos. *See DiPasquale*, 561 F. Supp. at 1345-46. Victor Szwanki was present during the Courtney incident, and the Serubos participated in both incidents.

Based on the various collection incidents, Anthony DiPasquale, Victor Szwanki, August Redding, James DiPasquale, John Serubo, and Peter Serubo were convicted on one count of conspiring to collect claimed debts by extortionate means. We turn now to the merits of their appeals.

II. MERITS

A. *Extensions of Credit.*

Title II of the Consumer Credit Protection Act, codified as chapter 42, 18 U.S.C. §§ 891-896, establishes as federal crimes several types of extortionate credit transactions. The appellants stand convicted under section 894(a), which provides:

> Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> (1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

Under the definitional section, "[t]o extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred." 18 U.S.C. § 891(1).

Despite this sweeping definition, the appellants contend that the indictment did not charge, the district court did not properly define, and the evidence did not reveal, any extensions of credit. Above all else, the appellants deny that they made loans to their victims or that they agreed to defer the repayment of debts.

1. *Sufficiency of the Indictment.* The district court denied the appellants' pretrial motion to dismiss the indictment, which contains three separate counts that charge "the use of extortionate means . . . to collect and attempt to collect a claimed debt . . . and to punish [the victim] for the non-repayment thereof." In similar language, the fourth count charges a knowing conspiracy to collect and to attempt to collect claimed debts and to punish victims for the non-repayment of claimed debts. Each count of the indictment states that these are acts in violation of 18 U.S.C. § 894(a). The question is whether the indictment is legally sufficient.

An extension of credit is either a loan or an agreement to defer the repayment or satisfaction of a debt or claim. 18 U.S.C. § 891(1). The debt or claim may be "acknowledged or disputed, valid or invalid". *Id.* It may even be wholly fictitious. *United States v. Cheiman*, 578 F.2d 160, 164 n.17 (6th Cir. 1978), *cert.*

denied, 439 U.S. 1069 (1979); *United States v. Nace*, 561 F.2d 763, 770 (9th Cir. 1977); *cf. United States v. Totaro*, 550 F.2d 957, 958-59 (4th Cir.)(promised loan never received), *cert. denied*, 431 U.S. 920 (1977).

Furthermore, the agreement[2] to defer repayment may be "tacit or express". 18 U.S.C. § 891(1). A tacit agreement may be implied from the circumstances surrounding the creation of the debt. For example, in *United States v. Mase*, 566 F.2d 671 (2d Cir. 1977), *cert. denied*, 435 U.S. 916 (1978), the court held that the placing of a bet evidenced "a simultaneous agreement to defer repayment" of the debt that would accrue when one party or the other lost the bet.[3] *Id.* at 674; *see also United States v. Czarnecki*, 552 F.2d 698, 703 (6th Cir.), *cert. denied*, 431 U.S. 939 (1977). Similarly, in *United States v. Horton*, 676 F.2d 1165, 1171-72 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1184 (1983), the court suggested that there was an extension of credit to one Conkrite because Conkrite owed the defendant money in connection with a drug sale, *see id.* at 1172.[4]

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2. The term "agreement" has not been strictly construed. *See United States v. Bufalino*, 576 F.2d 446, 452 (2d Cir.), *cert. denied*, 439 U.S. 928 (1978)(debtor may be swindler who never intended to repay loss); *Czarnecki*, 552 F.2d at 703 (extension of credit does not require bilateral agreement, supported by consideration, to defer for a specific period the payment of a "definite" debt).

3. The *Mase* court noted that because bettors must often pay when they bet, not every bet includes an agreement to defer repayment.

4. The defendant in *Horton* also extended credit to Cronkite's partner, Hardy, by giving Hardy time to honor a bad check. *Id.* at 1171-72. There was evidence that Cronkite was responsible for Hardy's debt as well as his own. *Id.* at 1172. This may explain why the court in *United States v. Boulahanis*, 677 F.2d 586, 590 (7th Cir.), *cert. denied*, 103 S. Ct. 375 (1982), cited *Horton* as an example of an explicit deferral of repayment.

We conclude that under section 891(1). an agreement to defer the repayment of a debt may be implied from the debt. even if the debt is wholly fictitious. When a self-styled creditor appears before his "debtor" and demands satisfaction. the creditor posits both a debt and the prior deferral of its repayment. We believe that the definition of an extension of credit encompasses this type of transaction. which the indictment before us accurately describes as the collection of a claimed debt.

The appellants rely heavily on *United States v. Boulahanis*. 677 F.2d 586. 590-91 (7th Cir.). *cert. denied*. 103 S. Ct. 375 (1982). in which the court held that neither a debt nor circumstantial evidence of an agreement to defer repayment of a debt is sufficient to prove an extension of credit. Citing *Boulahanis*. the appellants argue that we must not construe the definition of an extension of credit to include claimed debts.

Congress explicitly intended that chapter 42 be wielded with "vigor and imagination". Conf. Rep. No. 1397. 90th Cong.. 2d Sess. 31. *reprinted in* 1968 U.S. Code Cong. & Ad. News 1962. 2029. Specifically. Congress intended that chapter 42 reach transactions that are. by their nature. difficult to prove. Congress knew that extortionate credit transactions are characterized by "the unwritten word. the silent threat." 114 Cong. Rec. 1608 (1968) (remarks of Rep. Widnall). President Ford. then a congressman. demonstrated that the difficulty of proving extortionate credit transactions effectively exempted them from the antiracketeering statutes. *See* House Republican Task Force on Crime. *id.* at 14105 :*see also* Pub. L. 90-321. tit. II. § 201(a). 82 Stat. 146. 159 (congressional findings).

The definition of an extension of credit in section 891(1) was generously drafted. The definition has been

even more generously construed. Only the *Boulahanis* court has constrained the scope of chapter 42. We decline to follow *Boulahanis* because we believe that its construction is inconsistent with the language and purpose of chapter 42. We conclude that a claimed debt is one type of extension of credit under section 891(1). The indictment was therefore sufficient under 18 U.S.C. § 894(a).

2. *The Jury Instructions and the Evidence.* The appellants contend that the district court erred when it charged the jury as to the possibly fictitious nature of the claimed debts. As we have already noted, claimed debts may be fictitious; thus, the instruction was not incorrect. Nor did the court err when it instructed that "the claim could be based on the assertion that money had been stolen [or] that money was due for the delivery of drugs which had not been paid for." A debt or claim may arise from any source, by any means. *See, e.g., Horton*, 676 F.2d at 1172 (drug sale); *United States v. Annerino*, 495 F.2d 1159, 1166 (7th Cir. 1974)(unauthorized use of credit cards and misappropriation of funds); *see also* 18 U.S.C. § 891(1)("any debt . . . however arising").

The district court also instructed that the elements of a crime under section 894 were "violence, a claim of indebtedness and an agreement to accept payment at another time." *See DiPasquale*, 561 F. Supp. at 1356. This instruction required the government to prove more than was necessary to obtain a conviction, because it separated the claimed debt from the agreement to defer repayment. Although a claimed debt plus an independent agreement to defer repayment is one type of extension of credit, *see, e.g., United States v. Keresty*, 465 F.2d 36, 39 (3d Cir.), *cert. denied*, 409 U.S. 991 (1972), it is not the type charged in the indictment.

Citing *Stirone v. United States*, 361 U.S. 212

(1960), the appellants argue that this variance requires reversal. The indictment in *Stirone* predicated an essential element of a crime on the fact that the victim imported sand from another state, but the district court charged that the essential element could be proved either by the victim's importation of sand *or* by his planned future exportation of steel. *See id.* at 214. Reversing Stirone's conviction, the Supreme Court held that "it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned." *Id.* at 217.

The appellants' invocation of *Stirone* is not persuasive. Although the district court required proof of more than the indictment charged, we can say with certainty that if the jury found a claimed debt *and* an independent agreement to defer repayment, it found a claimed debt. "[I]f the indictment is sufficient, evidence which meets its allegations and proves something more without proving an offense different from that which is charged, cannot make a variance between the probata and the allegata." *Goldberger v. United States*, 4 F.2d 10, 12 (3d Cir. 1925).

The district court told the jury that the "violence, a claim of indebtedness, and an agreement to accept payment at another time" could occur in any sequence on a particular occasion. *See DiPasquale*, 561 F. Supp. at 1356. The appellants argue that if the use of extortionate means antedates the extension of credit, there is no violation of section 894, although there may be an extortionate extension of credit[5] in violation of section 892.

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5. An extortionate extension of credit is:

> any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to

Given the district court's instruction, the jury could have found that violence preceded or followed "a claim of indebtedness". A claim of indebtedness is not itself the claimed debt. Whether the claimed debts in this case were fictitious or real, each was claimed to have arisen prior to its extortionate collection. Thus, the extensions of credit were posited as having occurred in the past, before the use of violent means to collect them. We need not decide whether this sequence is essential to a violation under section 894.[6]

Finally, the appellants argue that the district court erred when it said that the essence of the crime is extortion. While this may be an incomplete description of a crime under section 894, any harm it might have caused was forestalled by the court's repeated explanation that a violation under section 894 requires a claim of indebtedness.

B. *Single Conspiracy or Multiple Conspiracies.*

1. *The Jury Instructions.* The appellants contend that the district court misstated the law in its instructions to the jury on the conspiracy count. The district court said, in part, "[i]f the Government hasn't proven the overall conspiracy charged . . . no one can be found guilty [on the conspiracy count]." The appellants note the similarity between this instruction and the "all or nothing" charge that was fatal in *United States*

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make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

18 U.S.C. § 891(6).

6. We note, however, that in *United States v. Briola*, 465 F.2d 1018 (10th Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973), the court rejected an argument similar to the appellants'. *See id.* at 1021-22.

v. Kelly, 349 F.2d 720, 757 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). The *Kelly* court held that the all or nothing charge erroneously suggested that the jury could not find any of the defendants guilty of the single conspiracy charged unless it found all of them guilty. The government protests that the appellants failed to raise this issue at trial. We shall assume without deciding that the issue is properly before us.

The government argues that taken in their entirety, the district court's instructions on the conspiracy count were correct. In addition to its potentially misleading language, the court instructed that if the jury found that there was a unitary conspiracy, it could then convict any defendant found to have joined that conspiracy. This part of the charge clearly separates proof of the conspiracy from proof of each defendant's participation in the conspiracy, as in *United States v. Bynum*, 485 F.2d 490, 497-98 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974).

During their deliberations, however, the jurors sent a note to the court which read in part, "On [the conspiracy count], all must be guilty or none." We conclude that the district court's initial instructions on the issue of conspiracy confused the jury. *See Bollenbach v. United States*, 326 U.S. 607, 612 (1946)(jury question indicates confusion).

"When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach*, 326 U.S. at 612-13. Without objection from counsel, the district court gave further instructions to the jury that adequately explained the distinction between proof of the conspiracy charged and proof of its membership. We believe that the district court, unlike the trial court in *Bollenbach*,

remedied the jury's confusion and enabled them to reach a legally correct verdict on the conspiracy count.[7]

2. *Variance of Proof.* Although Anthony DiPasquale directed and participated in every incident but one, the Cosmo and Kolzer incidents were collections on behalf of Anthony from associates in his drug transactions, and the Crawford, Rosetti, and Courtney incidents were collections on behalf of the Serubos from persons who worked for or did business with John's Chevrolet. The appellants therefore argue that although the indictment charged a single conspiracy, the evidence proved at least two separate conspiracies. The appellants also suggest that the lapse of time between the Cosmo and Kolzer incidents subdivided the collections on Anthony's behalf into two distinct conspiracies. Such variances of proof, if prejudicial, would be grounds for reversal. *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946); *Berger v. United States*, 295 U.S. 78, 82 (1935).

The district court meticulously detailed the similarity of method and result, and the partial overlap of participants, in the various incidents. *See DiPasquale*, 561 F. Supp. at 1350-52. We agree that this evidence is probative of a unitary conspiracy, and we have relied on it in our review. The similarity of the various incidents, however, is not inconsistent with "separate adventures of like character." *Kotteakos*, 328 U.S. at 769, *quoted in United States v. Jackson*, 696 F.2d 578, 583 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 1531 (1983).[8]

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7. The government points out that if the harm envisioned by the *Kelly* court had occurred, the jury would not have acquitted defendants Neil Ferber and Nicholas Fidelibus on the conspiracy count.

8. We do not agree with the appellants' contention that in its charge to the jury, the district court focused too heavily on the similarity of the incidents.

We are not persuaded by the appellants' attempt to subdivide the collections on Anthony's behalf into two chronologically distinct conspiracies. A conspiracy terminates when its "principal purposes" have been accomplished. *United States v. Steele*, 685 F.2d 793, 801 (3d Cir.), *cert. denied*, 103 S. Ct. 213 (1982); *United States v. Mayes*, 512 F.2d 637, 642 (6th Cir.), *cert. denied*, 422 U.S. 1008, 423 U.S. 840 (1975). The extortionate collections of claimed debts arising out of Anthony's drug transactions demonstrated "a continuity of purpose and a continued performance of acts", *id.*, and the lapse of a year's time between the Cosmo incidents and the Kolzer incident is not sufficient to prove that there were two similar but separate agreements.

The distinction between the collections on Anthony's behalf and the collections on behalf of the Serubos presents a closer question. In *Blumenthal v. United States*, 332 U.S. 539 (1947), the owner of some whiskey entered into an agreement with Goldsmith and Weiss to sell the whiskey illegally, and these two used three others as intermediaries. The Court acknowledged that "in a hypertechnical aspect," the evidence showed one agreement between the owner, Goldsmith, and Weiss, and a separate agreement between Goldsmith, Weiss, and their three intermediaries. *Id.* at 556. Nevertheless, the Court concluded that there was one overall conspiracy, evidenced by the intermediaries' awareness that their transactions were part of a larger scheme, which encompassed two interdependent subplots. *See id.* at 555 n.14, 556, 558-59.

There is sufficient evidence to support the jury's conclusion that the Serubos were aware that the collections in which they participated were part of a larger, ongoing scheme to collect claimed debts by extortionate means. The Serubos described Anthony

as the man who took care of their "problems", and they concede that the evidence showed that Anthony helped them collect their "debts". The Serubos deny knowledge of the Cosmo or Kolzer incidents, but there is considerable circumstantial evidence to the contrary.

Anthony introduced the Serubos to Joseph West in February 1981. Although West testified that the purpose of the meeting was to arrange for the Serubos to send work to West's garage, the meeting establishes that there was a connection between Anthony, the Serubos, and West before the last collection incident involving payments to Anthony. During that last incident, while Kolzer was still held captive, Anthony visited John's Chevrolet.

In the first incident involving payments to the Serubos, Crawford, the victim, was taken from John's Chevrolet to West's garage. Crawford testified that Anthony, in Peter Serubo's presence, ordered someone to take Crawford to "the garage". Joseph West, who was also present, testified that the Serubos suggested that Crawford be taken to "the garage" and hung on a hook, reminiscent of the Kolzer incident. There was also testimony that suggests that Anthony publicized his exploits among his associates.

Given this evidence, it is very unlikely that the Serubos were unaware of Anthony's collection scheme. The appellants argue, however, that because the success of the collections on behalf of the Serubos was not, strictly speaking, dependent on the success of the collections on behalf of Anthony, the two schemes lack the interdependency that was essential to the outcome in *Blumenthal*.

We recognize that in many cases, courts, including our own, have pointed out the interdependency of component agreements in a larger conspiracy. *See, e.g., United States v. Kenny*, 462 F.2d 1205, 1217 (3d

Cir.), *cert. denied*, 409 U.S. 914 (1972). Interdependency, however, is simply "evidence of an agreement". *United States v. Taylor*, 562 F.2d 1345, 1352 (2d Cir.), *cert. denied*, 432 U.S. 909 (1977). It is not an element of the offense. *United States v. Shoup*, 608 F.2d 950, 957 n.12 (3d Cir. 1979); *cf. United States v. Rush*, 666 F.2d 10, 12 (2d Cir. 1981)(court need not instruct jury to apply "'stake in the interest' test").

Even the pooling of resources "can betoken the interlocking interests of the alleged co-conspirators, supporting the inferences of knowledge and dependency." *United States v. Barnes*, 604 F.2d 121, 155 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980). Collections on behalf of the Serubos and collections on Anthony's behalf involved the use of common resources, including Joseph West's garage. In addition, participants in the Crawford incident used stories of Anthony's past collections to help persuade Crawford to pay money to the Serubos. By contrast, in cases on which the appellants rely, there was virtually no evidence to connect parallel but distinct schemes. For example, in *Jackson, supra*, the use of a common arsonist was the only persuasive evidence to connect two sets of fires. *See also United States v. Snider*, 720 F.2d 985, 989 (8th Cir. 1983); *United States v. Camiel*, 689 F.2d 31, 36-37 & n.3 (3d Cir. 1982).

We agree that those convicted of conspiracy must not only be aware of another person's illegal scheme, but "must in some sense promote [the] venture himself, make it his own, have a stake in its outcome." *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940)(Judge Learned Hand writing for the court), *aff'd*, 311 U.S. 205 (1940). In *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969), *cert. denied*, 405 U.S. 1040 (1972), those who participated in only one of the core conspirators' numerous hijackings had no

interest in the establishment or maintenance of a continuing conspiracy to hijack trucks. *See id.* at 744. By contrast, the Serubos were interested in and dependent upon the continuing conspiracy in which they participated.

Whether there was one conspiracy is a question of fact, and our only task is to ascertain whether the evidence, taken in the light most favorable to the government, supports the jury's finding that there was a single conspiracy. *United States v. Brooks*, 697 F.2d 517, 523 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 1526, 1531 (1983). We conclude that there was sufficient evidence to support the jury's finding of a single conspiracy to collect claimed debts by extortionate means.[9]

C. *James DiPasquale's Membership in the Conspiracy.*

James DiPasquale argues that there was insufficient evidence to support the jury's conclusion that he was a member of the conspiracy to collect claimed debts by extortionate means. James contends that his membership cannot be predicated on a single incident. *See, e.g., United States v. DeNoia*, 451 F.2d 979, 981 (2d Cir. 1971). The *DeNoia* court, however, would not apply its "single transaction" rule where there is "independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself [is] one from which such knowledge may be inferred." *Id.*; *cf. Direct Sales Company v. United States*, 319 U.S. 703, 712 n.8 (1943)(if a seller is "indifferent" to a buyer's illegal

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9. This conclusion precludes August Redding's argument that he had nothing to do with the collections on behalf of the Serubos and James DiPasquale's argument that the Rosetti and Courtney incidents were not part of the conspiracy with which James was involved.

purpose, "single or casual transactions" may not demonstrate a conspiracy between the buyer and the seller).

This accords with our rule that, "[a]t a minimum, . . . it must be shown that . . . a person has knowledge of the conspiracy's illicit purpose when he performs acts which further that illicit purpose." *United States v. Klein*, 515 F.2d 751, 753 (3d Cir. 1975). The question is whether there was sufficient evidence for the jury to find that James was aware of the nature of the conspiracy when he acted in furtherance of it.

The incident in which James was involved was substantially similar to other incidents in furtherance of the conspiracy. James, with Victor Szwanki and two others, visited Cosmo in January 1980, attacked him, and demanded money that James said Cosmo owed Anthony. James also threatened to kill Cosmo. James protests that the purpose of his visit was not the same as the purpose of the other incidents because he brutalized Cosmo to help his brother, who was in jail at the time. This contention is not inconsistent with the fact that James beat up Cosmo in an attempt to collect a "debt" owed to Anthony. Although James's participation in the scheme was limited, he adopted both its methods and its goals in his attack on Cosmo.[10]

In addition to the evidence of the attack on Cosmo, there was testimony from an undercover detective that after James was indicted for conspiracy, James said, "I got arrested and I'm going to court, but don't worry. There's nine people involved and by the time this thing

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10. James argues that his participation in the conspiracy terminated with the Cosmo incidents, but he offered no evidence of his affirmative withdrawl from the conspiracy or of his repudiation of its purposes. *See, e.g., Steele*, 685 F.2d at 803-04. At any rate, the possibility that James may have left the conspiracy has no bearing on his conviction for having been a member.

comes to court the witnesses might fall down steps and break their fucking heads open." This testimony was admitted to show James's consciousness of guilt. *See DiPasquale*, 561 F. Supp. at 1353-54 & n.20.

The evidence against James was sufficient to support the jury's verdict. To borrow a metaphor from another court, even the cymbalist is part of the orchestra. *See United States v. Armedo-Sarmiento*, 545 F.2d 785, 794 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977).

D. *Anthony DiPasquale's Speedy Trial Act Claim.*

Anthony DiPasquale contends that the district court erred in denying his motion for dismissal under the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1976 & Supp. III). "Section 3161(c) mandates dismissal if trial does not commence within 70 days of the later of the filing of the indictment or the defendant's first appearance before a judicial officer of the court in which such charges are pending, unless the excess days can be excluded under section 3161(h)." *United States v. Novak*, 715 F.2d 810, 812 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1293 (1984).

The seventy-day period to trial began to run when Anthony was arraigned. *See United States v. Carrasquillo*, 667 F.2d 382, 384 (3d Cir. 1981). Considerably less than seventy days after Anthony's arraignment, John and Peter Serubo filed a notice of appeal from the disqualification of their counsel.[11] Anthony's counsel conceded in his oral argument to this court that the time during the pendency of the Serubos' interlocutory appeal was excludable from

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11. The Supreme Court has subsequently held that such disqualifications are not immediately appealable. *See Flanagan v. United States*, 104 S. Ct. 1051 (1984).

Anthony's seventy-day period to trial. *See* 18 U.S.C. §§ 3161(h)(1)(E)(exclusion for interlocutory appeals), 3161(h)(7)(exclusion based on a codefendant's exclusion); *see also Novak*, 715 F.2d at 814-15.

The interlocutory appeal was still pending on July 2, 1982, when Anthony filed his motion to dismiss under the Speedy Trial Act. Therefore, there was no violation of the Act when Anthony filed his motion to dismiss. Subsequent delays are not at issue. *See Novak*, 715 F.2d at 821. We conclude that the district court correctly denied Anthony's motion to dismiss.[12]

E. *Motions for Severance.*

Peter Serubo, John Serubo, Victor Szwanki, and James DiPasquale argue that the district court abused its discretion when it denied their motions for severance. As the appellants recognize, they bear a "heavy burden" when they protest a refusal to sever. *E.g. United States v. Boyd*, 595 F.2d 120, 125 (3d Cir. 1978). Insofar as these motions were based on contentions that there were multiple conspiracies, they were properly denied. *See, e.g., id.*

Victor Szwanki argues that because the district court denied his motion for severance, he was denied a speedy trial and was prejudiced by the admission of certain evidence. The district court correctly denied Szwanki's pretrial motion to dismiss the indictment for an undue delay in prosecution. We address Szwanki's evidentiary arguments in the next section of this opinion.

James DiPasquale argues that he should have been tried separately because only a relatively small

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12. Anthony makes several arguments in opposition to the government's exclusion of certain amounts of time for various pretrial motions under 18 U.S.C. § 3161(h)(1)(F). Given our disposition of the issue, we need not address the question of pretrial motion exclusions.

amount of the evidence presented described his activities. We have held that "[a] defendant is not entitled to severance merely because the evidence against a co-defendant is more damaging than against him." *United States v. Dansker*, 537 F.2d 40, 62 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Some courts consider a disparity in the weight or quantity of the evidence to be one factor in the review of a denial of severance, but they will not require reversal on this ground unless there are exacerbating circumstances. *E.g. United States v. Bruner*, 657 F.2d 1278, 1290 (D.C. Cir. 1981).

James also protests that being tried with his brother increased the risk of prejudice, as in *United States v. Sampol*, 636 F.2d 621, 647 (D.C. Cir. 1980). In *Sampol*, however, there was a massive failure to segregate the evidence, and "the confusion was so great" that a witness who described a meeting with one brother misidentified him as the other brother. *Id.*; *see DiPasquale*, 561 F. Supp. at 1346-47 n.15.

Our fundamental concern is whether joinder unfairly prejudiced the jury against a particular defendant. *See, e.g., United States v. Mardian*, 546 F.2d 973, 979 (D.C. Cir. 1976). We must determine whether the jury could reasonably be expected to "compartmentalize" the evidence against the various defendants and to "consider it for its proper purposes". *Dansker*, 537 F.2d at 62; *see also, e.g., Boyd*, 595 F.2d at 125.

The proceedings on review do not reveal the chaos of *Sampol* or the multiple handicaps that befell the defendant in *Mardian*. James is Anthony's brother, and James played a comparatively small part in the conspiracy. Any serious prejudice that these facts might have engendered was averted by the government's well-ordered presentation of its case, *see DiPasquale*, 561 F. Supp. at 1348, and by the trial

court's repeated instructions to the jury to consider the evidence against each defendant. Given that the government has a legitimate interest in trying coconspirators together, *see, e.g., Boyd*, 595 F.2d at 125, we cannot say that the district court abused its discretion in denying James's motion for severance.[13]

F. *Evidentiary Rulings.*

1. *The Rosetti and Courtney Incidents.* The appellants argue that evidence of the Rosetti and Courtney incidents was improperly admitted. The appellants concede that the conspiracy described in the indictment was of sufficient duration to include the Rosetti and Courtney incidents, but they argue that in fact the conspiracy terminated sooner. There is no evidence that the conspiracy terminated before the date of the indictment, and we cannot ignore the grand jury's charge that the conspiracy was still in existence on that date. The appellants' reliance on *Boyd*, 595 F.2d at 125-27, is misplaced because the evidence introduced in *Boyd* described events that occurred after the termination date charged in the indictment.

The indictment, however, made no mention of the Rosetti and Courtney incidents. We have held that "when an overt act in furtherance of a conspiracy proven at trial differs from any of the overt acts alleged in the indictment", this variance is permissible unless it deprives the defendant of fair notice or puts him in danger of double jeopardy. *United States v. Adamo*, 534 F.2d 31, 39 (3d Cir.), *cert. denied*, 429 U.S. 841 (1976). The appellants claim that they had insufficient notice that Courtney and Rosetti would testify.

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13. Defendants other than James moved for severance at trial because they feared that the evidence against Anthony would be unfairly prejudicial. The district court did not abuse its discretion in denying these motions.

Generally speaking, surprise is not a ground for the exclusion of evidence in a criminal trial. 1 *Weinstein's Evidence* ¶ 403[1] at 403-12 to -14, ¶ 403[6] at 403-60 (1982). Nor is the government "required to divulge the identity of its witnesses in a noncapital case." *United States v. Addonizio*, 451 F.2d 49, 62 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972). Furthermore, the district court determined that the appellants were not prejudiced by the government's failure to disclose pretrial that it would offer evidence of the Rosetti and Courtney incidents. *See DiPasquale*, 561 F. Supp. at 1354 n.22. We agree.

The appellants also argue that no extortionate means were used in the Rosetti incident. We reject this argument for the reasons given by the district court, *see id.* at 1355.

2. *Evidence of Incarceration and of Prior Criminal Activities.* Victor Szwanki protests the admission of evidence that "one of the Defendants was in jail." This appears to be a reference to testimony that in January 1980, James DiPasquale told Cosmo, and August Redding told Kolzer, that Anthony needed money to get out of jail. Szwanki suggests that this evidence was prejudicial hearsay. It does not appear that the testimony was challenged at trial as hearsay. We will therefore not consider that issue on appeal. As to the objection of prejudice, the government argued at trial that this testimony gave credibility to the demand for money, and the district court ruled that the evidence was more probative than prejudicial. *See DiPasquale*, 561 F. Supp. at 1343 n.6. Such balancing is the province of the trial court, *see United States v. Catalano*, 491 F.2d 268, 274 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974), and the court did not abuse its discretion here.

Szwanki also protests the admission of evidence of prior criminal activies, apparently in reference to the

testimony of Cosmo and Kolzer that each participated in drug deals with Anthony. The district court admitted the evidence under Fed. R. Evid. 404(b) and ruled that it was more probative than prejudicial. *See id.* at 1352. Again, the district court did not abuse its discretion.

G. *Prosecutorial Misconduct.*

We turn now to an exchange of invective between counsel for Anthony DiPasquale, counsel for John Serubo, and one of the prosecutors. In his closing argument, Anthony's attorney described a witness immunity agreement as follows. "[T]he agreement if [sic] very simple: 'Say what we want to hear.'" Anthony's attorney continued:

> A script. It's an absolute script directed by the Government. You have been invited to a play.
>
> . . . .
>
> . . . They said to Kolzer, "What is important is 'owe money.' This is what you have to say because we've got to search through our little book here and find out what the federal crime could be. [sic]

Anthony's attorney repeated these insinuations and accusations throughout his summation.

John Serubo's attorney rose to echo his colleague's attack: "[The witness] made a deal with the Government and it was after that deal was consummated that he said he would testify for the Government on behalf of the Government and the way the Government wished him to testify." Describing the testimony of another witness, John's attorney said, "Only parts of his testimony were fabricated, and I suggest to you he had help. He didn't do it alone." And later, "What were the untruths? What had to be weaved [sic] into that truthful scenario by whomever it was that helped him to put it together?"

The prosecutor, in his own words, "was itching for the opportunity to respond", and when the opportunity appeared, he seized it.

> [Counsel for Anthony and counsel for John] accused [the FBI agent, another prosecutor] and me of something that's very serious. . . .
>
> Now I'm making a proposition to you because I'm absolutely confident of what your choice will be. If you think that [the FBI agent or the other prosecutor] or I is capable of [subornation of perjury] to convict these defendants, then it should take you about five minutes to acquit every one of them.

The prosecutor then made several intermittent comments to the effect that if he had schooled the witnesses, he would not have been so stupid as to tell them to testify as they did. The prosecutor reviewed the remaining evidence without further interjections, until he reached his last words to the jury.

> I ask you to return not only a verdict of guilty but a swift verdict, a verdict that will tell these defendants, "We do not condone what you did," and a swift verdict will tell [counsel for Anthony and counsel for John], "We don't agree with your allegations of misconduct by [the FBI agent, the co-prosecutor] and me."

Unless it would be plain error not to order a new trial based on prosecutorial misconduct, the failure to object at trial to a prosecutor's remarks is fatal. *United States v. Somers*, 496 F.2d 723, 742 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974); *United States v. Kravitz*, 281 F.2d 581, 587 & n.10 (3d Cir. 1960), *cert. denied*, 364 U.S. 941 (1961). Although the appellants asserted prosecutorial misconduct in support of their post-trial

motions for acquittal or a new trial, not all of the appellants protested the prosecutor's summation at trial. We must therefore review the appellants' arguments under two different standards.

1. *Anthony and the Serubos.* Peter Serubo claims that he objected to the prosecutor's summation at trial, but he does not cite the record, and we can find no trace of his objection or of a similar objection by John Serubo or by Anthony DiPasquale. We review for plain error.

Time and again, we have emphasized that a prosecutor bears a special responsibility not to abuse the prestige that accrues to his office. *See United States v. Gallagher*, 576 F.2d 1028, 1042-43 (3d Cir. 1978), *cert. dismissed*, 444 U.S. 1040 (1980); *Somers*, 496 F.2d at 742; *Kravitz*, 281 F.2d 581, 587; *see also, e.g., Berger*, 295 U.S. at 88 (1935); *see generally United States v. Modica*, 663 F.2d 1173, 1178-86 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982). On the other hand, the principle of prosecutorial restraint does not free a defense attorney to argue with impunity that the government wrote and directed a play.

Here, a fair reading of the prosecutor's remarks leads us to conclude that "the prosecution was only meeting the defense on a level of the defense's own choosing." *United States v. LaSorsa*, 480 F.2d 522, 526 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *see also, e.g., Lawn v. United States*, 355 U.S. 339, 359-60 n.15 (1958); *United States v. West*, 670 F.2d 675, 689 (7th Cir.), *cert. denied*, 457 U.S. 1124, 1139 (1982); *United States v. Praetorious*, 622 F.2d 1054, 1060-61 (2d Cir.), *cert. denied sub nom. Lebel v. United States*, 449 U.S. 860 (1980); *Somers*, 496 F.2d at 741. *But see United States v. Young*, No. 81-1536, slip op. at 10-11 (10th Cir. Feb. 22, 1983)(unpublished per curiam opinion rejecting reply doctrine), *cert.*

granted, 104 S. Ct.1271 (1984)(No. 83-469). John Serubo claims that the prosecutor's remarks were unprovoked. We disagree.

Nevertheless, there are limits to what the "reply doctrine" authorizes a prosecutor to say. As we held in *Somers*, "[t]he doctrine serves to permit neutralization of improper defense arguments; it does not operate as a license for improper affirmative attacks upon defendants." 496 F.2d at 741. Although the prosecutor's remark in *Somers* was "causally related" to the defense counsel's accusation, *id.* at 741, it was not directly responsive to it, but used the accusation as a springboard to suggest that the prosecution had undisclosed evidence that established the defendant's guilt.

By contrast, the prosecutor's remarks in this case, although rhetorically phrased, were essentially a denial of the defense counsel's accusation that the government wrote its witnesses' testimony. We cannot say that it was plain error for the district court to deny Anthony's and the Serubos' motions for a new trial based on the prosecutor's summation.

The Supreme Court has recently emphasized the importance of the harmless error doctrine in determining the consequences of prosecutorial misconduct. *See United States v. Hasting*, 103 S. Ct. 1974 (1983). We hold that even if there was error, it was harmless because there was no substantial prejudice to Anthony or the Serubos. Specifically, the prosecutor's statements, which can impliedly be taken as seeking to vindicate his own credibility, did not permeate the three-week trial; the trial court took curative measures in its charge to the jury;[14] and the

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14. The trial court cautioned the jurors not to be prejudiced by the fact that the United States government was prosecuting the case and reminded them to base their verdicts solely on the

case against Anthony and the Serubos was strong. *See Modica*, 663 F.2d at 1181; *Gallagher*, 576 F.2d at 1042.

2. *James, Redding, and Szwanki.* When the prosecutor completed his summation, defendants including James DiPasquale immediately protested and were soon joined by August Redding and Victor Szwanki. These appellants did not argue that the prosecutor's closing was an improper response to the attack by counsel for Anthony and counsel for John Serubo. Rather, they moved for severance, arguing that they had been prejudiced by inflammatory remarks that they did not provoke. We must determine whether the prosecutor's remarks deprived James, Redding, and Szwanki of a fair trial. *See, e.g., Somers*, 496 F.2d at 736-37.

The government argues that because the prosecutor specifically addressed his response to counsel for Anthony and to counsel for John Serubo, his remarks could not have prejudiced the jury against James, Redding, or Szwanki. *See id.* at 739-40 n.32. We are not satisfied that the prosecutor's remarks were as insular as the government contends. The question is whether they were sufficiently prejudicial to have turned the jury against James, Redding, and Szwanki.

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evidence. The court concluded its charge with a direct comment on the prosecutor's summation:

> It was suggested during [the prosecutor's] argument or his rebuttal to you that you should return a prompt verdict. I am not setting any time limit on your deliberations. If you are convinced beyond a reasonable doubt as to the guilt of a defendant you may return a prompt verdict, but you should not return prompt verdicts just for the purpose of getting your job over with. You have to decide important questions that affect the lives of each of these persons and you are to take the time that the importance and scope of your deliberations demand and require.

We have already noted that the statements of the prosecutor were limited to one instance in the course of a three week trial and that the court issued curative instructions. To this we add that the government had a strong case against Szwanki and Redding, both of whom repeatedly and actively participated in the extortionate collections. *See Berger*, 295 U.S. at 88. The evidence against James was not as strong. Nevertheless, we dó not believe that the prosecutor's remarks, taken in context of the trial as a whole, were sufficiently prejudicial to have deprived James of his right to a fair trial. We conclude that the district court did not commit reversible error in refusing to disturb James' conviction, or the convictions of Redding and Szwanki, on this ground.

We take occasion, once again, to remind the district courts of their responsibility to forestall unfair provocation and to constrain prosecutorial misconduct. *See United States v. LeFevre*, 483 F.2d 477, 480 (3d Cir. 1973); *United States v. Sigal*, 341 F.2d 837, 845 (3d Cir), *cert. denied*, 382 U.S. 811 (1965). Where there is blatant deviation from acceptable standards, prompt intervention by the district court is clearly in order.

IV.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — JUDGMENT AFFIRMING CONVICTION DATED JULY 31, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-1364, 83-1365, 83-1367, 83-1368, 83-1369 & 83-1449

UNITED STATES OF AMERICA,

vs.

ANTHONY DiPASQUALE,
Appellant in No. 83-1364

JAMES DiPASQUALE,
Appellant in No. 83-1365

AUGUST REDDING, aka "Porky"
Appellant in No. 83-1367

JOHN SERUBO,
Appellant in No. 83-1368

PETER SERUBO,
Appellant in No. 83-1369

VICTOR SZWANKI,
Appellant in No. 83-1449

(D.C. Criminal Nos. 81-361-01,02,05,06,07,08)

Appendix B

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ and GARTH, *Circuit Judges* and PORTER, *District Judge**

These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel March 1, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered May 4, 1983, in Eastern District of Pennsylvania Criminal Nos. 81-00361-06 and 81-00361-07; entered May 5, 1983, in Eastern District of Pennsylvania Criminal Nos. 81-00361-02 and 81-00361-05; entered May 10, 1983, in Eastern District of Pennsylvania Criminal Nos. 81-00361-01 and 81-00361-08, and appealed here respectively at Nos. 83-1368, 83-1369, 83-1365, 83-1367, 83-1364 and 83-1449 be, and the same are hereby affirmed.

ATTEST,

s/ M. Elizabeth Ferguson
Chief Deputy Clerk

July 31, 1984

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* Honorable David S. Porter, United States District Judge for the Southern District of Ohio, sitting by designation.

APPENDIX C — ORDER OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING *EN BANC* DATED AUGUST 28, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1368
No. 83-1369

UNITED STATES OF AMERICA,

v.

JOHN SERUBO,
Appellant in No. 83-1368

PETER SERUBO,
Appellant in No. 83-1369

(Criminal No. 81-00361 — E.D. Pa.)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*, and PORTER, *District Judge.**

---

* The Honorable David S. Porter, United States District Judge for the Southern District of Ohio, sitting by designation.

Appendix C

The petition for rehearing filed by appellants in the above entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Seitz
Circuit Judge

DATED: August 28, 1984

Nos. 84-659, 84-683, 84-5524 and 84-5816

In the Supreme Court of the United States

OCTOBER TERM, 1984

ANTHONY DIPASQUALE AND JAMES DIPASQUALE, PETITIONERS

v.

UNITED STATES OF AMERICA

PETER J. SERUBO AND JOHN SERUBO, PETITIONERS

v.

UNITED STATES OF AMERICA

AUGUST REDDING, PETITIONER

v.

UNITED STATES OF AMERICA

VICTOR SZWANKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether forcible collection of a claimed debt constitutes the use of extortionate means to collect an extension of credit in violation of 18 U.S.C. 894(a).

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-659

ANTHONY DIPASQUALE AND JAMES DIPASQUALE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 84-683

PETER J. SERUBO AND JOHN SERUBO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 84-5524

AUGUST REDDING, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-5816

VICTOR SZWANKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (84-659 Pet. App. 1a-34a) is reported at 740 F.2d 1282. The opinion of the district court (84-5524 Pet. App. 30a-53a) is reported at 561 F. Supp. 1338.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1984. A petition for rehearing was denied on August 28, 1984 (84-569 Pet. App. 35a-36a). The petitions for a writ of certiorari were filed on September 29, 1984 (No. 84-5524), October 24, 1984 (No. 84-569), October 26, 1984 (No. 84-683), and October 29, 1984 (No. 84-5816). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted on one count of conspiracy to collect extensions of credit by extortionate means, in violation of 18 U.S.C. 894(a). Five of the six petitioners also were convicted on various counts of the underlying substantive offense, in violation of 18 U.S.C. 894(a).[1] Petitioner Anthony DiPasquale was

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[1] The indictment in this case contained four counts and charged nine defendants. One of the defendants pleaded guilty prior to trial and testified for the government. Seven of the remaining eight defendants were convicted on some or all of the counts in the indictment. These seven defendants were all convicted on the conspiracy count (Count IV). On the substantive counts, the convictions were as follows: petitioners Anthony DiPasquale and Victor Szwanki were convicted of beating and threatening Michael Cosmo on December 13, 1979, to collect a claimed debt of $5,000 (Count I); and of beating

sentenced to a total of 80 years' imprisonment; petitioner Victor Szwanki was sentenced to 35 years' imprisonment; petitioner James DiPasquale was sentenced to 12 years' imprisonment; petitioner Peter Serubo was sentenced to 20 years' imprisonment; and petitioners John Serubo and August Redding were sentenced to 15 years' imprisonment.[2] The court of appeals affirmed (84-659 Pet. App. 1a-34a).

1. The facts of the case are set forth in detail in the opinion of the district court (84-5524 Pet. App. 33a-38a) and are summarized in the opinion of the court of appeals (84-659 Pet. App. 3a-6a). The evidence at trial showed that petitioners and co-defendant Nicholas Fidelibus extorted payment for nonexistent debts from five separate victims through a simple but brutal scheme: they would threaten, beat, or torture the victim until he admitted owing the debt, and they would then permit him to obtain the money from friends and relatives to repay the "debt."[3]

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and threatening James Kolzer on March 25 and 26, 1981, to collect a claimed debt of $16,000 (Count II). Petitioners Anthony DiPasquale, John Serubo and Peter Serubo, as well as co-defendant Nicholas Fidelibus, were convicted of beating and threatening Swain Crawford on May 9, 1981, to collect a claimed debt of $1,800 (Count III). 84-5524 Pet. App. 33a.

[2] The district court informed Peter and John Serubo that their sentences would be reduced by 10 years if they repaid $7,000 taken from two of the victims.

[3] The victims were Michael Cosmo, James Kolzer, Swain Crawford, Francis Rosetti and Mark Courtney. Michael Cosmo was attacked in September and December 1979 and January 1980; the December attack was the subject of Count I of the indictment. James Kolzer was attacked on the evening of March 25, 1981; that attack formed the basis for Count II. Swain Crawford was attacked on May 9, 1981; that attack

a. The first victim, Michael Cosmo, sold methamphetamine for petitioners Anthony and James DiPasquale during 1978 and 1979. Twice during the fall of 1979, Anthony DiPasquale extorted from Cosmo a total of $7,500 that DiPasquale claimed Cosmo owed him, giving Cosmo an opportunity to raise the money from family or others. On the first occasion, Cosmo was severely beaten after he was asked by petitioner Redding if he had the money he owed Anthony DiPasquale. In mid-December 1979, Cosmo went to Anthony DiPasquale's house, at DiPasquale's request, to carpet the basement. When Cosmo later attempted to leave to take his car to his wife, petitioner Redding stopped him at the door and knocked him to the ground. As Cosmo lay on the floor, Redding kicked and punched him and petitiner Anthony DiPasquale repeatedly struck Cosmo on the side of the head with a fireplace poker until Cosmo was rendered unconscious. After Cosmo awoke, Anthony shouted that if Cosmo did not have "the money" he would die. Cosmo agreed to borrow money to pay DiPasquale. Cosmo was permitted to go upstairs, where he again was beaten, this time by petitioner Szwanki, and was released eight blocks from his house with a towel over his head. As a result, Cosmo was hospitalized for several days. After his release, he borrowed money from a family friend

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underlay Count III. Francis Rosetti was threatened in May 1981, and Mark Courtney, a former employee of the Serubos, was attacked on June 3, 1981. The acts that formed the basis of the substantive counts were included among the overt acts listed in the indictment. Although the threats to Rosetti and the attack on Courtney were not listed as overt acts in the indictment, testimony about those incidents was admitted as evidence of the conspiracy. 84-5524 Pet. App. 37a-38a.

and paid Anthony DiPasquale. 84-569 Pet. App. 3a; 84-5524 Pet. App. 33a-34a.[4]

b. Like Cosmo, James Kolzer sold drugs for Anthony DiPasquale. In December 1980, Kolzer lent Anthony $10,000 for the purchase of chemicals to manufacture methamphetamine. After they split the proceeds of the resulting sales, Anthony insisted that Kolzer still owed him $8,000. Kolzer denied the debt and insisted that Anthony DiPasquale in fact owed him money. In early February 1981, petitioner Redding telephoned Kolzer, told him he was calling at Anthony's request, and said that DiPasquale needed the $8,000 Kolzer owed him to get out of jail. Kolzer again denied any debt and refused to pay. 84-659 Pet. App. 4a; 84-5524 Pet. App. 35a.

In March 1981, after Kolzer and Anthony discussed a renewal of their drug dealing, Anthony telephoned Kolzer and asked him to meet him. At the agreed time, Kolzer met with Anthony, who was accompanied by Szwanki. They drove to an auto body shop, where Anthony and Szwanki drew guns on Kolzer. Szwanki then forced Kolzer to kneel, covered his head with a bag, and bound his hands and feet. Kolzer was then struck repeatedly with a pipe. Anthony said that Kolzer owed him $8,000 but that it would cost Kolzer more to remain alive. Later, Anthony and Szwanki hanged Kolzer by a chain hoist, beat him repeatedly, and burned him with a lamp.

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[4] Another incident involving Cosmo occurred in January 1980. Petitioners Szwanki and James DiPasquale went to Cosmo's home, and James DiPasquale demanded $25,000 that he claimed Cosmo owed his brother Anthony. When Cosmo denied the debt, James DiPasquale and Szwanki beat him. After Cosmo reported this incident to the police, James DiPasquale telephoned Cosmo and told him that he would be killed. 84-659 Pet. App. 3a-4a; 84-5524 Pet. App. 34a-35a.

Between assaults, Anthony and Szwanki interrogated Kolzer about how he was going to raise the money. Kolzer said he would raise the money from friends and relatives and made telephone calls for that purpose. Anthony and Szwanki subsequently took Kolzer to a Western Union office to pick up money that his son had wired, and they then took him to a bar to meet a cousin who had gathered money for him. 84-659 Pet. App. 4a-5a; 84-5524 Pet. App. 35a-36a.

c. The attack on the third victim, Swain Crawford, followed a similar pattern. Crawford was a used car salesman at a car dealership belonging to petitioners John and Peter Serubo. On May 9, 1981, after Crawford picked up his paycheck, Anthony DiPasquale directed Crawford to go to John Serubo's office. There he found Anthony DiPasquale, both Serubos, and another man. Anthony repeatedly punched Crawford and asked why he had taken money from Peter Serubo, who also told Crawford that he owed Serubo $1,800. Crawford denied owing the money. However, when Anthony pointed a gun at his head, Crawford telephoned a friend, who said she would try to get the money. Crawford was then taken to the auto body shop where victim Kolzer had been beaten, was told of several beatings there by DiPasquale, but also was told that he had nothing to worry about if he paid the money. Crawford then telephoned his friend again, and she provided Crawford with a diamond ring worth $1,800. Anthony first said that unless it was worth $12,000, it was not worth Crawford's life. But Anthony then gave the ring to Peter Serubo and instructed Crawford to return two days later with $1,800. Crawford complied with Anthony's instructions, even though he owed the Serubos nothing. 84-659 Pet. App. 5a-6a; 84-5524 Pet. App. 36a-37a.

d. Evidence also was introduced relating to the use of extortionate means to collect two other debts. The first incident involved Francis Rosetti, who operated an automobile repair service in Philadelphia and occasionally bought parts from the dealership owned by the Serubos. Anthony DiPasquale returned from John Serubo's house with photocopies of bills evidencing Rosetti's debt, and then visited Rosetti to demand payment. Rosetti complained that Anthony had scared his wife when he stopped at Rosetti's house and Anthony subsequently told Rosetti that "next time it won't be so friendly" (84-5524 Pet. App. 38a). Although Rosetti denied owing the money, he agreed to pay the Serubos $5,000, and they gave him two days to do so. Rosetti subsequently did make the payment. See *id.* at 37a-38a.

The second incident involved Mark Courtney, a salesman for a company that customized vans for the Serubos' dealership. Courtney was summoned to the dealership, where he was confronted by John and Peter Serubo, Anthony DiPasquale, and Szwanki. Peter Serubo told Courtney that the dealership was paying too much for the customized vans. While Anthony DiPasquale repeatedly hit Courtney, Peter Serubo screamed that Courtney owed them $5,000 because of the asserted overcharges. DiPasquale took $300 from Courtney's wallet for "debt" collection services, and Peter Serubo demanded payment by the next day. Courtney left the dealership and telephoned his employer for the money, and he paid the money the following day. 84-5524 Pet. App. 38a.

2. The court of appeals affirmed the convictions (84-659 Pet. App. 1a-34a), rejecting petitioners' contention that their conduct was beyond the reach of 18 U.S.C. 894(a). That Section prohibits the use of

extortionate means "(1) to collect or attempt to collect any extension of credit, or (2) to punish any person for the nonrepayment thereof." Relying on the definition of an extension of credit as a loan or an agreement to defer the repayment or satisfaction of a debt or claim (18 U.S.C. 891(1)), the court explained that under the statutory scheme, the debt or claim at issue may be disputed, invalid, or even wholly fictitious (84-659 Pet. App. 7a-8a). The court further explained that "under section 891(1), an agreement to defer the repayment of a debt may be implied from the debt, even if the debt is wholly fictitious" (84-659 Pet. App. 9a). The court held that the indictment's references to claimed debts were legally sufficient because "[w]hen a self-styled creditor appears before his 'debtor' and demands satisfaction, the creditor posits both a debt and the prior deferral of its repayment" (*ibid.*). Because the jury instructions separated the claimed debt from the agreement to defer repayment, the court concluded "with certainty" that "if the jury found a claimed debt *and* an independent agreement to defer repayment, it found a claimed debt" (*id.* at 11a (emphasis added)). Accordingly, with the element of violence clearly established, the court determined that the necessary elements of the offense were present (*id.* at 12a).

ARGUMENT

Petitioners contend that their conduct did not violate the Extortionate Credit Transaction Act, 18 U.S.C. 891-896. The court of appeals correctly rejected this fact-bound claim, and its holding does not conflict with any decision of this Court or of another court of appeals. Further review therefore is unwarranted.[5]

1. Petitioners' contention that their conduct did not violate 18 U.S.C. 894(a) is refuted by the plain language of that Section, which provides:

> Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> (1) to collect or attempt to collect any extension of credit, or
>
> (2) to punish any person for the nonrepayment thereof,
>
> shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

The term "[t]o extend credit" is defined broadly for these purposes to mean (18 U.S.C. 891(1)):

> to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim,

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[5] Petitioner Szwanki's petition also briefly addresses several other issues regarding allegedly prejudicial remarks by the prosecutor and hearsay testimony (84-5618 Pet. 4-5), and in the questions presented (*id.* at 2-3), he identifies several other issues that are not discussed in the body of the petition. We rely on the opinion of the court of appeals with regard to these other issues (84-659 Pet. App. 13a-31a), which are not raised by the other petitioners and do not warrant review by this Court.

> whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

In this case, the evidence at trial clearly showed that on each occasion one or more of the petitioners claimed that the victim owed money to Anthony DiPasquale or to the Serubos, and that extortionate means were used to collect or to attempt to collect the claimed debt. It is irrelevant for purposes of the Act that, as several of the petitioners stress (see 84-683 Pet. 7-11), the claims or debts were fictitious. Section 891(1), in sweeping terms, encompasses "any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising * * *." Petitioners' contention that the debts or claims involved here were fictitious simply means that they were "disputed" by the victims and were "invalid," features of debts or claims that expressly do *not* exclude them from coverage. Indeed, petitioner Redding concedes for present purposes that "the debt or claim may be wholly fictitious" (84-5524 Pet. 9).

2. a. Petitioners' principal contention, although framed in different ways, appears to be that no violation of 18 U.S.C. 894(a) occurred in this case because there was no preexisting extension of credit by Anthony DiPasquale, the Serubos, or others to the victims that petitioners in turn sought to collect by extortionate means in the incidents of violence that were established at trial. For example, several petitioners argue that although Anthony DiPasquale, Peter Serubo, and others may have insisted that the victims owed them money—which several petitioners concede gave rise to a claimed, but fictitious, debt [6]—

---

[6] See 84-659 Pet. 8-9; 84-5524 Pet. 9-10.

this debt was not an "extension of credit" within the meaning of 18 U.S.C. 894(a). See 84-659 Pet. 7-11; 84-683 Pet. 9-11; 84-5524 Pet. 9-12. This argument is without merit, especially in the circumstances of this case. The proof at trial was fully sufficient to support jury findings of—at the very least—a tacit agreement with the victims to defer payment of a debt or claim, which constitutes an "extension of credit" under 18 U.S.C. 891(1) and 894(a).

Victims Cosmo and Kolzer both testified that they received drugs on credit from Anthony DiPasquale. Cosmo and Kolzer sold the drugs and then used the sale proceeds for repayment to DiPasquale. Tr. 125, 130-131 (Cosmo); Tr. 3-86 (Kolzer). Kolzer further testified that on one occasion he had lent DiPasquale money for the purchase of chemicals to manufacture methamphetamine, in return for DiPasquale's delivery to Kolzer of the finished product. Thereafter, however, DiPasquale still insisted that Kolzer owed him $8,000 from the sale of the methamphetamine they had made (84-659 Pet. App. 4a; 84-5524 Pet. App. 35a).[7]

An analogous series of cases involving gambling partners establishes that when a defendant and a

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[7] Petitioner Redding concedes (84-5524 Pet. 7 n.**) that past credit transactions could be inferred from Cosmo's testimony about his drug dealings with DiPasquale, but Redding stresses that Cosmo gave uncontradicted testimony that the debts at issue in this case were fictitious. Redding also asserts (*id.* at 7) that Cosmo did not connect these fictitious debts to any prior transactions or events. Redding's objections are irrelevant. The jury may have chosen to disbelieve Cosmo's denial of indebtedness to DiPasquale. The evidence of Cosmo's and DiPasquale's past credit transactions was alone sufficient to support the inference that they had an agreement to defer payment whenever a debt arose between them.

victim have an ongoing relationship in which it is anticipated that one will owe money to the other from time to time, there is an implicit agreement between the two to defer payment each time such a debt arises. *United States* v. *Mase*, 556 F.2d 671, 674 (2d Cir. 1977). See also *United States* v. *Czarnecki*, 552 F.2d 698, 703 (6th Cir.), cert. denied, 431 U.S. 939 (1977); *United States* v. *Briola*, 465 F.2d 1018 (10th Cir. 1972), cert. denied, 409 U.S. 1108 (1973); *United States* v. *Keresty*, 465 F.2d 36 (3d Cir.), cert. denied, 409 U.S. 991 (1972). Similarly, in *United States* v. *Bufalino*, 576 F.2d 446 (2d Cir.), cert. denied, 439 U.S. 928 (1978), the victim obtained diamonds from the defendant by deceit, and the defendant attempted to collect repayment by force. Unlike in the gambling cases, there was no proof of a course of conduct; the evidence showed only that an obligation had arisen and that it was the understanding of the parties that the obligation would not be satisfied until some time in the future. Nonetheless, the court of appeals found that the proof satisfied the requirements of Section 894 (576 F.2d at 452). Consequently, the fact that in this case two of the victims had past deferral agreements with petitioner Anthony DiPasquale [8] made the evidence for a tacit agreement to defer here as convincing as in the gambling cases and far stronger than the evidence in *Bufalino*. See also *United States* v. *Horton*, 676

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[8] With respect to the third victim, Swain Crawford, there was evidence suggesting that Crawford had embezzled $1,500 from the Serubos' car dealership and that he had agreed to repay it (Tr. 56-57, 279 (Crawford)). This evidence was sufficient to support a finding that the Serubos, upon discovery of the misappropriation, agreed to deferral of Crawford's debt by accepting his promise to pay them back at a later date.

F.2d 1165, 1168, 1171 (7th Cir. 1982), cert. denied, 459 U.S. 1201 (1983) (finding of an extension of credit based, inter alia, on the fact that on one occasion the defendant gave the victim heroin on credit).

These circumstances are quite different from those in *United States* v. *Boulahanis*, 677 F.2d 586 (7th Cir.), cert. denied, 459 U.S. 1016 (1982), upon which petitioners principally rely.[9] See 84-659 Pet. 7, 10; 84-683 Pet. 6-7, 9, 11; 84-5524 Pet. 10-12, 15-17. In *Boulahanis*, the victim, the owner of a social club, was beaten by a group of men. The following night, the attackers reappeared and told the victim that if he did not pay them $300 protection money for the past month and $500 per month thereafter, they would shut the club down. The victim immediately paid. The court of appeals, observing that an extension of credit requires a deliberate act by a creditor and not just a default by a customer, found no extension of credit. But the Seventh Circuit emphasized (677 F.2d at 590) that "[i]f the previous night [the attackers] had given [the victim] additional time to pay, that would have been an agreement to defer payment of a debt, and such a deferral would be within the reach of section 894." The Seventh Circuit also acknowledged (*id.* at 591) that in some instances deferral could be inferred from circumstantial evidence. The court refused to make such a finding in that case, however, because it was of the view that there simply was no evidence of a deferral of payment (*id.* at 590-591).

Thus, in *Boulahanis*, there was no evidence concerning a prior relationship between the victim and

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[9] In *Boulahanis* the Seventh Circuit cited its then-recent decision in *United States* v. *Horton*, *supra*, with approval. See 677 F.2d at 590.

his attackers. The fact that the defendants in *Boulahanis* fixed a recurring date certain for receipt of future payments, without providing for deferral of missed payments, suggests that the victim's failure to pay in that case was indeed no more than a default, without a corresponding extension of credit by the defendants. In this case, by contrast, despite the victims' denial of indebtedness, the jury could have found that Anthony DiPasquale had given the victims drugs on credit (or that the Serubos had discovered the embezzlement (see note 8, *supra*)) with the understanding that the victims would at some future date repay them.

b. Even if the evidence of implicit deferral agreements arising from the parties' past relationships were insufficient to satisfy the *Boulahanis* standard as interpreted by petitioners, there is a second ground supporting a finding of agreements to defer. That ground rests on the fact that liability under Section 894 may arise subsequent to the defendant's threat or use of force if the defendant then defers the time for payment. See *United States* v. *Annerino*, 495 F.2d 1159, 1166 (7th Cir. 1974) (debt arising out of victim's misappropriation of funds deferred from time of threat until time of repayment meeting); *United States* v. *Briola*, *supra* (debt deferred from time of threat until the following day, so that victim could gather funds); *United States* v. *Andrino*, 501 F.2d 1373 (9th Cir. 1974) (victim's debt deferred from time of threat until time of repayment meeting).[10]

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[10] Several petitioners contend (84-659 Pet. 7-9; 84-5524 Pet. 17) that an agreement to defer payment made contemporaneously with or subsequently to the use of force consti-

There was no such agreement in *Boulahanis*, because on the night of the first attack the victim did not agree—either tacitly or explicitly—to payment of the money, much less to a time frame in which payment would be made. In this case, however, whenever petitioners made an extortionate demand for payment by a victim, they invariably also extracted the victim's agreement to pay the debt. They then withheld further beatings, at least temporarily, during which time the victim took agreed-upon steps to attempt to pay the debt. Moreover, one or more of the petitioners often stood by and supervised the victims' calls to friends and relatives to collect money; in doing so, they learned about and implicitly ratified the necessary lapse of time from the time of the call until the victim collected and turned over the money. In some cases, petitioners even specified a date certain for payment.[11]

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tutes a violation of Section 892(a), which prohibits the making of extortionate extensions of credit, but not of Section 894. However, the court of appeals did not decide whether a specific sequence of events is essential to establishing a violation of Section 894, because it concluded that "[w]hether the claimed debts in this case were fictitious or real, each was claimed to have arisen prior to its extortionate collection" (84-659 Pet. App. 12a). But even if the DiPasquales are correct (84-659 Pet. 8-9) that the jury could have found that there was no claimed debt prior to petitioners' threats, that fact hardly calls for this Court's review. The only court of appeals that has considered the timing issue decided that liability under Section 894 does not "turn on whether the beating was administered immediately before or immediately after the creation of the promise to pay." *United States* v. *Briola*, 465 F.2d at 1021.

[11] For example, Anthony DiPasquale instructed victim Crawford to bring $1,800 to the Serubos' car dealership on Monday, May 11, two days after he was attacked (84-659 Pet. App. 6a; 84-5524 Pet. App. 37a).

There is also other evidence supporting the conclusion that the defendants agreed to and even anticipated a postponement of payment from the time of the attack until some future collection date. Petitioners generally used pretexts to induce their victims to meet them at the place of attack—almost always a place remote from the victim's residence or business. Petitioners could hardly have expected their victims to meet them with large amounts of cash in hand. Moreover, it was at these meetings that petitioners extracted promises of payments of the victims' "debts." Hence, it is clear that petitioners expected time to pass from the time of assertion and acknowledgement of the debt until its collection. That alone constitutes evidence that petitioners agreed to defer their victims' debts.

3. While the evidence in this case supports both the jury's finding of claimed debts and agreements to defer repayment, the court of appeals, when reviewing the indictment's sufficiency, held (84-659 Pet. App. 9a) that under Section 894 the element of agreement to defer the repayment of a debt may be implied from the debt itself. This holding properly flows from Congress's mandate that the Extortionate Credit Transaction Act, 18 U.S.C. 891-896, is to be generously construed to reach a wide variety of transactions where violence is used to enforce payment.[12]

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[12] The Serubos' petition (84-683 Pet. 6-11) repeatedly refers the Court to titles of the Consumer Credit Protection Act, Pub. L. No. 90-321, Tit. II, 82 Stat. 159 *et seq.*, other than the Title containing the Extortionate Credit Transaction Act, at issue here. Since the various titles of the Consumer Credit Protection Act address vastly different concerns (compare *Perez* v. *United States*, 402 U.S. 146 (1971), with *Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155 (1981)) and contain sepa-

Congress intended that the Extortionate Credit Transactions Act be broadly construed. *United States* v. *Andrino*, 501 F.2d at 1377; *United States* v. *Annerino*, 495 F.2d at 1164-1166.[13] The members of the Conference Committee on the bill that became 18 U.S.C. 891-896 specifically warned that there should be "no doubt of the Congressional intention that [the bill] is a weapon to be used with vigor and imagination against every activity of organized crime that falls within its terms." H.R. Conf. Rep. 1397, 90th Cong., 2d Sess. 31 (1968). Consistently with this clear expression of congressional intent, the courts of appeals have recognized that narrow, technical readings of the Act's definitions would defeat the congressional aim of "match[ing] the ingenuity of the criminal in adopting new, more evasive, 'forms' and 'techniques.'" *United States* v. *Andrino*, 501 F.2d at 1377. In addiiton, the courts repeatedly have rejected any interpretations that smack of a "strict commercial law understanding" of the Act. *United States* v. *Czarnecki*, 552 F.2d at 703.

Section 891(1) defines an extension of credit as an agreement to defer the "repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising * * *." Relying on this language, several courts have held

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rate sections stating Congress's findings and applicable definitions, petitioners' citations to other titles and cases thereunder have no bearing on the issue here.

[13] We note that the *Boulahanis* court did not explicitly address the legislative intent underlying the Extortionate Credit Transactions Act. But at the time *Boulahanis* was decided, the Seventh Circuit had already joined several other circuits in holding that the Act should be interpreted generously. *United States* v. *Annerino*, 495 F.2d at 1164-1166.

that the statute reaches debts arising in a broad range of transactions, many of which bear little resemblance to traditional conceptions of a loan. See, *e.g.*, *United States* v. *Neal*, 692 F.2d 1296 (10th Cir. 1982) (debt arose when narcotics trafficker withheld profits from partner); *United States* v. *Bufalino*, *supra* (debt arose from swindle); *United States* v. *Annerino*, *supra* (debt arose through unauthorized use of credit cards and misappropriation of partnership funds); *United States* v. *Bonanno*, 467 F.2d 14 (9th Cir. 1972) (debt arose when marijuana load was lost in transportation).

The statute also contemplates a broad construction of the deferral requirement. " '[E]xtortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment." Pub. L. No. 90-321, § 201(a)(2), 82 Stat. 159. Thus the very approach of the Act is to "define extortionate credit transactions in terms of this express finding rather than imposing a requirement that the prosecution prove each of the elements of a loan shark transaction qua loan shark transaction." *United States* v. *Keresty*, 465 F.2d at 41; see also *United States* v. *Andrino*, *supra*; *United States* v. *Czarnecki*, *supra*.

It necessarily follows that an extension of credit may arise from a single transaction where a self-styled creditor appears before his victim, posits a debt, and demands satisfaction. The position petitioner Redding urges (84-5524 Pet. 14), under which the existence of an agreement to defer repayment must be shown by facts independent of those proving a debt or claim, yields logically absurd re-

sults.[14] The approach of the court below is simply to take a defendant at his word.[15] If in conjuring up a prior transaction to "justify" his violent collection efforts, a defendant explicitly or implicitly posits a debt and prior or future deferral of its payment, his liability under Section 894 should be the same as if the debt and deferral were real.[16]

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[14] Likewise irrelevant is petitioner Redding's observation (84-5524 Pet. 12-13) that the court below cited only cases where there was evidence independent of a debt or claim to support the existence of a deferral agreement. Most cases, particularly those involving real debts, will present such independent evidence. See, *e.g.*, *United States* v. *Nace*, 561 F.2d 763 (9th Cir. 1977); *United States* v. *Totaro*, 550 F.2d 957 (4th Cir.), cert. denied, 431 U.S. 920 (1977). But that does not mean that in some cases evidence of deferral cannot be implied from the debt itself.

[15] Petitioner Redding is incorrect in contending (84-5524 Pet. 10) that the court below requires nothing more than proof of a debt. The court cited with approval the observation in *United States* v. *Mase*, 556 F.2d 671, 674 n.6 (2d Cir. 1977), that because bettors must often pay when they bet, not every betting debt includes an agreement to defer repayment. This suggests that the court would scrutinize the debt at issue to determine whether its circumstances permit the inference of a deferral agreement.

[16] In any event, the statement by the court below (84-659 Pet. App. 10a) that "a claimed debt is one type of extension of credit under section 891(1)" was made in that portion of the opinion dealing with challenges to the adequacy of the indictment. As we have shown, the proof at trial demonstrated both "a claimed debt and an independent agreement to defer repayment" (*id.* at 11a (emphasis in original)). The *Boulahanis* court, on the other hand, considered only the evidentiary question of whether the debt and other circumstantial evidence set forth in the record before it was sufficient to prove an extension of credit.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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